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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

vs.

SIERRA CLUB and ENVIRONMENTAL DEFENSE FUND,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT SIERRA CLUB

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QUESTION PRESENTED

Whether the court below was precluded from awarding attorneys fees to respondents under Clean Air Act § 307(f), 42 U.S.C. § 7607(f) solely because they did not prevail on the merits.

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BRIEF FOR RESPONDENT SIERRA CLUB

STATEMENT

Introduction

The issue in this case is whether a court is precluded from awarding attorneys fees to a non-prevailing party under any circumstances pursuant to Clean Air Act § 307(f), 42 U.S.C. § 7607(f). That section authorizes the Court of Appeals to award fees in any case brought under Clean Air Act § 307 "whenever it determines that such an award is appropriate." The court below ruled that the Sierra Club and Environmental Defense Fund should be awarded fees, even though they did not prevail on the merits in an extremely close case. Although awards to non-prevailing parties are rare, the court concluded, in this case, because of the importance, complexity and novelty of

the issues raised, the substantial nature of the contributions of the Sierra Club and Environmental Defense Fund, and the exemplary character of their work, an award would be justified. The government objects, asserting that the Court of Appeals is absolutely precluded from awarding fees to non-prevailing parties.

In order to appreciate the factors which led the court to award fees here, it is necessary to review the underlying litigation. Accordingly, a brief summary follows.

The underlying litigation

Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) was perhaps the most momentous decision ever in the field of environmental law. The opinion had enormous significance in terms of economic, environmental, health and energy impacts. *Sierra Club v. Costle, supra,* 657 F.2d at 313. The issues litigated concerned the degree of air pollution control that would be required at all new coal-fired steam electric power plants to be built in the United States. Such plants account for 48% of the electricity produced in America, and burn 68% of the coal mined in this country. *Sierra Club v. Costle, supra,* 657 F.2d at 313. They also produce immense amounts of pollution—13.6 million tons of sulfur dioxide (SO_2) in 1975. This constituted 64% of the total nationwide sulfur dioxide emissions the following year.[1] *Sierra Club v. Costle, supra,* 657 F.2d at 313.

Under Clean Air Act § 111, 42 U.S.C. § 7401, the Environmental Protection Agency is required to establish standards of performance for major new sources of air pollu-

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[1] SO_2 "at the very least" is "known to cause or contribute to respiratory illnesses. *Sierra Club v. Costle, supra,* 657 F.2d at 11 and references cited at note 10.

tion, such as coal-fired power plants, which reflect the use of the best available control technology, taking into account costs, health and environmental impacts, and energy requirements. Purportedly acting pursuant to the statute as it then read, EPA originally promulgated a new source performance standard (NSPS) for coal-fired power plants of 1.2 lbs. of sulfur dioxide per million BTU (36 Fed. Reg. 24876, December 23, 1971). This first NSPS, in effect, allowed power plants burning low sulfur coal, located mainly in the western United States[2] to comply without using any pollution control equipment, whatsoever. *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 656 (D.C. Cir. 1975). It would have permitted a 23% total national annual increase in SO_2 emissions by 1995. *Sierra Club v. Costle, supra*, 657 F.2d at 414.

The Sierra Club and two local government units of the Navajo Tribe were concerned about this vast projected increase in SO_2 emissions, which would be especially severe in the west.[3] They were disturbed that Western power plants could get away without using any SO_2 pollution abatement methods, at all, despite the availability of technology to reduce those emissions by at least 90%. Accordingly, they requested EPA to revise the standard to require at least 90% SO_2 removal at all power plants, regardless of the sulfur content of the coal they burned. The agency refused to consider revising the standard and the petitioners sought review. In *Oljato Chapter of the Navajo Tribe v. Train, supra*, 515 F.2d 654, 667, the Court of Ap-

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[2]Ninety percent of western coal reserves are low sulfur. See *Sierra Club v. Costle, supra*, 657 F.2d at 348, note 179.

[3]SO_2 emissions in the western United States would almost be cut in half if maximum controls are applied. See 44 Fed. Reg. at 33608, Table 3 (June 11, 1979).

peals held that the agency was required to consider the petitioners' request seriously and provide a substantive response. The court instructed them to file a formal, detailed petition with EPA to initiate the process.

Accordingly, the Sierra Club and the Navajo groups filed a petition for a revision of the NSPS to require uniform 90% SO_2 removal in August, 1976. The filing of the petition attracted tremendous attention nationwide as it became widely known that SO_2 emissions from new Western power plants were not being regulated. The matter quickly came before Congress and, as part of the comprehensive 1977 amendments, it added a requirement to Clean Air Act § 111 that EPA must promulgate a specific percentage reduction standard, as well as an emission limitation requirement. Thus, actual, technological means of emission control would have to be used at all power plants. The Conference Committee report indicated that the percentage reduction was to be uniform nationwide, although departures from a uniform standard based on varying fuel characteristics would be allowed under limited circumstances. H.R. Rep. No. 95-564, 95th Cong., 1st Sess., p. 130 (1977).

The rule making proceeding on the Sierra Club petition lasted almost three years and amassed an unbelievably large and complex record, including 120 studies prepared by EPA, 400 technical papers, and 1,400 public comments. There was a total of 2,520 items in the official administrative record. The Joint Appendix in *Sierra Club v. Costle*, which contained only a small fraction of the record, consisted of 5,620 pages. See *Sierra Club v. Gorsuch*, 672 F.2d at 40. The major issues involved—the efficacy and reliability of various SO_2 control methodologies, econometric modeling of the impact of various standards on utility be-

havior, and the impact of alternative standards on usable coal reserves—involved a staggering degree of technical complexity. See *Sierra Club v. Gorsuch*, 672 F.2d at 39. *Sierra Club v. Costle, supra*, 657 F.2d at 410.

Because of the huge economic[4] and environmental consequences of EPA's decision, the "conflicting interests play[ed] fiercely for enormous stakes . . ." (*Sierra Club v. Costle, supra*, 657 F.2d at 410). Health and environmental groups urged the agency to implement a "full control" strategy—requiring 90% SO_2 removal at all power plants. The utility industry, concerned over the immense costs involved, advocated a "sliding scale" standard. Under this concept, the industry suggested, plants burning the lowest sulfur coal would be subject only to a 20% (later 50%) removal requirement. The percentage removal requirement would increase proportionally for higher sulfur content coals, to a maximum of 85%. *Sierra Club v. Costle, supra*, 657 F.2d at 354[5].

The agency first proposed a "full control" alternative, similar to that advocated by the Sierra Club, 42 Fed. Reg. 42154, 42160, col. 3 (September 19, 1978). However, the final rule, adopted June 11, 1979, opted for "variable control", a variation on the utilities' "partial control" sugges-

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[4]EPA estimated full control would cost $45 billion and the least stringent alternative standard would cost $31 billion. See 44 Fed. Reg. at 33609, Table 5 (June 11, 1979).

[5]The coal industry was interested in making sure that the 1.2 lbs./MBTU emissions limitation was not lowered, as some EPA trial balloons indicated it might be. See *Sierra Club v. Costle, supra*, 657 F.2d at 386. That industry feared that a lower emission limitation might mean that certain high sulfur coals would no longer be suitable for burning at power plants. See *Sierra Club v. Costle, supra*, 657 F.2d at 384-86.

tion, in which the percentage reduction would decrease for lower sulfur coals down to a minimum of 70%. 44 Fed. Reg. 33580, June 11, 1979. See *Sierra Club v. Costle, supra,* 657 F.2d at 316.

The agency advanced two principal arguments for its choice of variable, rather than full control. First, it developed and utilized an econometric computer model to predict utilities' reactions to various alternative standards and hence to derive estimates of the costs, energy requirements, and environmental impact associated with each of those standards. *Sierra Club v. Costle, supra,* 657 F.2d 321-27. EPA's model predicted that the variable standard would yield best results in all three categories.

Second, the agency asserted that a less stringent, 70% removal requirement was necessary in order to encourage an emerging and potentially superior new technology for removing SO_2 from low sulfur coals—dry scrubbing. EPA claimed that since it was unclear whether dry scrubbing was capable of going beyond 70% removal, utilities would not choose to employ the new methodology if the standard were greater than 70%. See *Sierra Club v. Costle, supra,* 657 F.2d at 343.

The Sierra Club thereupon filed a petition for review in the D.C. Circuit Court of Appeals pursuant to Clean Air Act § 307, contending that EPA should not have deviated from the uniform full control requirement it had originally proposed. It objected to EPA's regulatory analysis, which attempted to predict long-term national trends for alternative levels of control. In any event, the Sierra Club argued, the econometric computer model used by EPA to make those predictions was flawed by improper assumptions and methodology.

It also argued that the dry scrubbing rationale relied upon by the agency was improper, since dry scrubbing had not yet been "adequately demonstrated", and so could not serve as the basis for a NSPS. Furthermore, the Sierra Club asserted, the administrative record refuted EPA's contention that dry scrubbing could not achieve more than 70% SO_2 removal and that utilities would not use that technology if the removal requirement were any higher. Finally, the Sierra Club objected to EPA's introduction of the dry scrubbing rationale and the "variable control" option after the public comment period had expired and only days before the final rule was issued.[8]

The Court of Appeals turned down these arguments in *Sierra Club v. Costle, supra,* 657 F.2d 298. First, it construed Clean Air Act § 111 to permit the agency to assess national, regional, and long-term economic, environmental, and energy impacts, rejecting our contention that the Act excluded consideration of those factors. *Sierra Club v. Costle, supra,* 657 F.2d at 329-332. The court was "more sympathetic to the Sierra Club's complaint about the reliability of EPA's econometric model." 657 F.2d at 332. Nonetheless, it reasoned, computer modeling offers the only realistic method of making immensely complex analysis demanded by the statute. 657 F.2d at 332-33. In a landmark holding, the court concluded that, because of the dangers that a modeling format may "improperly skew" an agency's analysis, it must employ certain "safety valves": public notice and the acceptance and consideration of public

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[8]The "variable control" standard was also attacked by the utility industry on the ground that the 90% maximum removal standard was too stringent. The Environmental Defense Fund sought review of EPA's reaffirmation of the 1.2 lbs./MBTU emission limitation.

comment on the assumptions and data incorporated in the model; the admission of uncertainties; and the acceptance of ultimate responsibility for the decision by the agency, itself, rather than the computer. 657 F.2d at 334.

On the dry scrubbing controversy, the court agreed that the Sierra Club had shown that "dry scrubbing can achieve significantly better than the 70% floor adopted by EPA", (657 F.2d at 348, esp. note 179) and also that removal efficiencies of higher than 70% would still be economical. 657 F.2d at 350, note 184. After a detailed summary of the record, the court conceded that "the support in the record for selecting 70% as the magic percentage for encouragement of dry scrubbing is less than overwhelming." 657 F.2d at 351. The court also agreed that "given the state of this record we would have been reluctant to uphold EPA's discretion to vary the standard solely on the basis of dry scrubbing . . ." 657 F.2d at 351. Nevertheless, since "variable control" was sufficiently justified under the "regulatory analysis" discussed above, the court concluded it could not overturn the agency decision. 657 F.2d at 351-52.

Finally, the Court of Appeals acknowledged that "Sierra Club's criticism of the procedural history of the variable standard is not unwarranted . . ." 657 F.2d at 353. It also conceded that "this rule making was by no means a neat and tidy proceeding, and it might well have been the wiser course if EPA had chosen to publish a new proposal for another round of comments." *Id.* at 356. But the Court of Appeals found it was constrained to uphold the EPA action because of the special, "rigorous" standard for judicial review of procedural errors contained in Clean Air Act § 307(d)(8), 42 U.S.C. § 7607(d)(8): "The procedural error must be 'of central relevance to the outcome of the

rule,' and 'the errors were so serious and related to matters of such central relevance to the rules that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.'" 657 F.2d at 391.

The lower court also recognized another limitation on its authority to review the EPA's decision—this Court's opinion in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). In that case, the lower court noted, this Court "unambiguously cautioned" it "against imposing its own notions of proper procedures upon an administrative agency entrusted with substantive functions by Congress." 657 F.2d at 183.[7]

The court summed up its encyclopedic opinion[8] as follows:

> We reach our decision after interminable record searching (and considerable soul searching). We have read the record with as hard a look as mortal judges can probably give its thousands of pages. We have adopted a simple and straight-forward standard of review, probed the agency's rationale, studied its references (and those of appellants), endeavored to understand them where they were intelligible (parts were simply impenetrable), and on close questions given the agency the benefit of the doubt out of deference for the terrible complexity of its job. We are not engineers, computer modelers, economists or statisticians, although many of the documents in this record require such expertise—and more.
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[7]The lower court also rejected the challenges presented by Environmental Defense Fund and the utilities.

[8]The opinion was 132 pages long and contained 540 footnotes.

> We cannot redo the agency's job; Congress has told us, at least in proceedings under this Act, that it will not brook reversal for small procedural errors; *Vermont Yankee* reinforces the admonition. So in the end we can only make our best effort to understand, to see if the result makes sense, and to assure that nothing unlawful or irrational has taken place. In this case, we have taken a long while to come to a short conclusion: the rule is reasonable. 657 F.2d at 410.

Attorneys fees awarded

The Sierra Club and the Environmental Defense Fund moved for attorneys fees for their participation in the *Costle* case, pursuant to Clean Air Act § 307(f), 42 U.S.C. § 7607(f), which was added as part of the 1977 amendments. It provides:

> In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such an award is appropriate.

In *Sierra Club v. Gorsuch*, 672 F.2d at 33 (D.C. Cir. 1982) the Court of Appeals unanimously agreed that the Sierra Club and EDF were entitled to fees, even though they had not prevailed on the merits. In rejecting the government's contention that a fee award is not "appropriate" unless a party prevails in whole or in part, the lower court held that while the Sierra Club and EDF did not "substantially prevail", they *did* "substantially contribute to the goals" of the Clean Air Act. The issues raised were "important, complex, and novel", the contributions of EDF and the Sierra Club were "substantial and not duplicative" of those of other parties, and the caliber of their presentations was "exemplary". 672 F.2d at 39.

The court reviewed the supreme importance and complexity of the technical and statutory construction issues outlined above, and credited the role of the Sierra Club in raising and helping to dispose of crucial issues under the 1977 Clean Air Act Amendments:

> Although it seems almost inconceivable that a major review of the rule could have been conducted without questioning EPA's authority and evidentiary basis for promulgating a variable percentage reduction standard, an issue that the EPA Administrator had referred to at the start of the rulemaking as the "main" issue in the proceeding, Sierra Club was the only party to raise it. The court was thus totally dependent upon Sierra Club to brief and advocate the opposition to a variable standard. Without Sierra Club, an issue conceded by EPA to be critically important would not have been raised or decided during the first judicial challenge to the statutory provision. The absence of debate on the issue, moreover, could have affected the outcome of other related issues in the case, *e.g.*, the proper levels of total emissions (the so-called 1.2 lbs./MBTU standard), since individual standards of section 111 operate interdependently. And the argument pressed most intensely by the utilities, that a 90% reduction in sulfur emissions was technologically infeasible given the state of antipollution technology, would have been far less completely aired without Sierra Club's participation. The various parts of a complex rule like this one do not travel alone, and the court's education on each part of the rule informed its decision on other parts. 672 F.2d at 40-41.

The lower court concluded that because of their substantial contributions to the resolution of the important issues

raised in the litigation, the Sierra Club and EDF should be compensated:

> In conclusion, we find that the express goals of the Clean Air Act—prompt resolution of serious questions of statutory interpretation and citizen participation in monitoring administration of the Act through enforcement suits—require that substantial contributions to significant litigation in furtherance of these goals be compensated. It was absolutely essential in a case of this dimension that this court have expert and articulate spokesmen for environmental as well as industrial interests. The rulemaking process not only involved highly technical and complex data, but controversial considerations of public policy. Given the complexity of the subject matter, without competent representatives of environmental interests, the process of judicial review might have been fatally skewed. 672 F.2d at 41.

SUMMARY OF ARGUMENT

1. The literal language of Clean Air Act § 307(f) clearly permits the court to award fees to non-prevailing, as well as prevailing and substantially prevailing parties. This Court is not at liberty to construe the statute so as to add limitations not imposed by the statute on the lower court's discretion to award fees. It may not inquire into the wisdom of the legislature's judgment. Common law doctrines to the contrary must yield before the specific statutory authorization for fees in this case.

2. The committee reports for § 307(f) and Clean Air Act § 304(d), a parallel attorneys fees provision, unambiguously endorse fees for non-prevailing parties in appropriate cases. Congress specifically rejected an early attempt to limit the fees provision to parties who prevail in

whole or in part. Instead, it cited and endorsed judicial language sanctioning fees for parties who did not prevail. This Court should not be lulled into accepting the government's attempts to manufacture legislative history which contradicts Congress' clearly expressed intent.

3. Every judicial opinion which has considered this issue has endorsed the viewpoint of the court below. This Court should honor the principle of stare decisis and follow those decisions.

4. Public policy considerations do not justify a departure from Congress' clearly expressed intent. Awarding fees to respondents in this action will not provoke an avalanche of unjustified lawsuits. Fee awards to non-prevailing parties will be made only in the most exceptional cases and, in any event, the substantial amounts of non-compensable time which must be expended in order to perfect an action under Clean Air Act § 307 will discourage potential litigants with marginal causes of action.

ARGUMENT

I

THE STATUTORY LANGUAGE SUPPORTS THE COURT'S CONSTRUCTION

A. This Court is bound by the statute, as written

Clean Air Act § 307(f), 42 U.S.C. § 7607(f) states that a court "may award costs of litigation (including reasonable attorney and expert witness fees) *whenever it determines that such an award is appropriate.*" [Emphasis supplied.] As the Court of Appeals pointed out, "on its face, the statutory provision clearly permits the court to award attorneys' fees to prevailing, substantially prevailing, or

non-prevailing parties in 'appropriate' cases." 672 F.2d at 34.

Nonetheless, the government argues that the Court of Appeals may not award fees to a party who does not prevail in whole or in part. (See, *e.g.*, Petition for Certiorari, pp. 18-19; Brief, p. 15). The government asks this court to re-write the statute, so as to restrict the courts' discretion to find an award of fees "appropriate" exclusively to cases in which the party seeking fees has prevailed in whole or in part. In short, it seeks a judicial amendment of Section 307(f) from an "appropriate" to a "prevailing party" standard. The justification offered by the government for this remarkable request is that the court below "has established a precedent that threatens to impose substantial burdens on the federal courts, administrative agencies and the Justice Department by encouraging unproductive, expensive and time-consuming litigation." Petition for Writ of Certiorari, p. 8; see also Brief, pp. 36-37.

This court has emphasized time and again that it is not empowered to amend laws enacted by Congress, even in the face of strong evidence that the legislation in question is highly unwise. In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the TVA sought to overturn an injunction which had been issued against completion of the Tellico Dam in Tennessee, on which more than $100 million had already been spent, because the dam threatened to exterminate the snail darter, a tiny local fish which had been listed as an endangered species pursuant to the Endangered Species Act of 1973. Section 7 of that Act, 16 U.S.C. § 1536, requires all federal agencies "to ensure that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of an endangered species or destroy or modify its habitat.

TVA argued that Section 7 was not intended to stop operation of a project, such as the Tellico Dam, which was near completion when an endangered species was discovered in its path. The agency also pointed to Congressional appropriations earmarked for completion of the dam subsequent to discovery of the snail darter and to committee reports stating that the Endangered Species Act should not apply to the Tellico Dam. See 437 U.S. at 170-171.

The Chief Justice, speaking for this Court, conceded that "it may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million." 437 U.S. at 172. But, he emphasized, this Court was not empowered to act upon the "common sense" suggestion of TVA that "the burden on the public through the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter." 437 U.S. at 157. The opinion pointed out that it would be extremely difficult for a court to balance these two factors "even assuming we have the power to engage in such a weighing process, which we emphatically do not." 437 U.S. at 188. The *TVA* opinion disposed of a plea, much like that of the government in the present case, to construe the Endangered Species Act "reasonably":

> Here we are urged to view the Endangered Species Act "reasonably", and hence shape a remedy "that accords with some modicum of common sense and the public weal." . . . But is that our function? We have no expert knowledge on the subject of Endangered Species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam.
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> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.
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>
> [I]n our constitutional system, the commitment to the separation of powers is too fundamental for us to preempt Congressional action by judicially decreeing what accords with "common sense and the public weal." Our constitution vests such responsibilities in the political branches. 437 U.S. 194-95.

This court has continued to adhere strongly to the principle that the judiciary may not usurp Congress' legislative function, regardless of how ill-advised it may consider a particular piece of legislation. In *Touche Ross & Co. v. Redington,* 442 U.S. 560, 578 (1979), it noted that "The ultimate question is one of Congressional intent, not one of whether this court thinks it can improve upon the statutory scheme that Congress enacted into law." The court noted that the plaintiffs ". . . contend that the result we have reached sanctions injustice. But even if that were the case, the argument is made in the wrong forum, for we are not at liberty to legislate." See also *Universities Research Ass'n. v. Coutu,* 450 U.C. 754, 770 (1981); *Rubin v. United States,* 449 U.S. 421, 431, note 8 (1981).

In *Diamond v. Chakrabarty,* 447 U.S. 303 (1980), the issue was whether a patent could be obtained upon a new micro-organism produced in the laboratory by genetic engineering. The commissioner of patents and trademarks argued that living things, such as micro-organisms, could

not be patented. This court refused to be swayed by a "gruesome parade of horribles," set forth by the patent office and a number of Nobel laureates on the dangers of genetic research, which would presumably be encouraged by a decision in favor of patentability. This court refused to consider these assertions:

> [W]e are without competence to entertain these arguments—either to brush them aside as fantasies generated by fear of the unknown, or to act on them . . . whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the executive, and not to the courts. 447 U.S. at 317.

The court went on to quote from *TVA v. Hill* for the proposition that it could not decide on the wisdom of a particular statute. "Our task, rather, is a narrow one of determining what Congress meant by the words it used in the statutes; once that is done our powers are exhausted." 447 U.S. at 318. Congress is free to change the law, it continued, "but, until Congress takes such action, this court must construe the language of [the patent statute] as it is." *Ibid.*

Here, as in *Diamond*, the government presents a "parade of horribles"—"unproductive, expensive and time-consuming litigation"[9]—as a justification for this Court to ignore the unmistakable intent of Congress and change Clean Air Act § 307(f) by imposing a "prevailing party" requirement. As we show in Point II, Congress specifically re-

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[9]As we show in Point IV below, these dire forebodings are nothing but legalized fantasies. No one will lightly undertake major litigation of this sort on the very slim chance that he may collect attorneys fees if he loses.

jected such a limitation. This Court may not now reinstate it.

B. The common law doctrines concerning attorneys fees and sovereign immunity do not apply in this case

The government maintains that the lower court's ruling "is inconsistent with certain fundamental considerations underlying the doctrine of sovereign immunity and the traditional rules governing the allocation of attorneys' fees." (Brief, p. 13). But in this case, the Court of Appeals acted pursuant to a specific statutory authorization, not the common law. As this Court has recognized for over a century, ". . . a common law maxim . . . must yield to statutory provisions inconsistent with it . . ." *Wallach v. Van Riswich,* 92 U.S. 202, 212 (1875).

The Sierra Club does not quarrel with the government's assertion that Congressional consent to waive statutory immunity must be "unequivocally expressed." (Brief, p. 13). In *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 261 (1975), this court recognized that Congress may provide for attorneys fees, thereby overriding the common law rule, and has done so, "in a variety of circumstances." The Court also noted that attorneys fees may be awarded against the government only if "expressly provided for by statute."

Congress specifically stated it intended to meet the *Alyeska* test in this instance. The House Report on § 307 (f) referred to the *Alyeska* decision as follows: "In adopting this provision concerning fees, the committee intended to meet the requirement for a specific authorization imposed by 28 U.S.C. § 2412 and by the Supreme Court's ruling in *Alyeska* . . ." H.R. Rep. No. 95-294, 95th Cong., 1st

Sess., p. 337 (1977). There could hardly be a more emphatic statement of legislative intent; indeed, the government concedes that "Congress meant to waive the government's traditional immunity and to overcome the presumption of the 'American Rule' against fee shifting." (Petition for Certiorari, p. 15).

Thus, its reliance on such cases as *United States v. Testan*, 424 U.S. 392, 399 (1976) and *Lehman v. Nakshian*, 453 U.S. 156 (1981) is completely misplaced. In *Testan*, this Court refused to imply the existence of a cause of action against the government for a wrongful civil service classification in the absence of a specific statute authorizing such a proceeding. In *Lehman* it held that absent a specific statutory authorization, there was no right to a jury trial in an action against the federal government under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621-34 (1970). But neither of those cases nor any others cited by the government involved a specific authorization such as we have here.

II

THE LEGISLATIVE HISTORY OF CLEAN AIR ACT § 307(f) SHOWS THAT CONGRESS INTENDED TO ALLOW THE COURTS TO AWARD FEES TO NON-PREVAILING PARTIES IN APPROPRIATE CIRCUMSTANCES

The House Report on Clean Air Act § 307(f) specifically rejected the concept of limiting fees to prevailing parties:

> "In the case of section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise

> serve the public interest. The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the "prevailing party". In fact, such an amendment was expressly rejected by the committee, largely on the grounds set forth in *NRDC v. EPA*, 484 F.2d 1331, 1388 (1st Cir. 1973)" H.R. Rep. No. 94-294 95th Cong., 1st Sess., p. 337 (1977).

The Senate, too, specifically rejected a provision that would have limited fees to prevailing or substantially prevailing parties. The rejected language would have required the court to award fees to a prevailing party and would have given it discretion to award fees "in any case in which such party prevails in part . . ." See Sen. Committee on Environment and Public Works, "A Legislative History of the Clean Air Act Amendments of 1977," 95th Cong., 2nd Sess., vol. 3, p. 688 (Committee Print 1978), hereinafter cited as "Legislative History". The rejected language was taken from S252, a bill passed by the Senate in the previous session, but never enacted. See Legislative History, pp. 3856, 3893.

Congress was well aware that the new fees provision marked a significant expansion of the previous language. A section-by-section analysis of S252 prepared by the Senate Subcommittee on Environmental Pollution noted that there was an area of "controversy" concerning the need to prevail in order to be awarded fees. It raised the question, "Should the basis for an award of fees be need, rather than the judicial disposition of the suit?" Legislative History, p. 3893. That Subcommittee was also advised by the law firm of Hunton & Williams (who represented the utility industry in the underlying litigation in this case), on behalf of the Edison Electric Institute that the language of S252 is

"less sweeping" than the new "appropriate" standard. Legislative History, pp. 4146-47.

The language in *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331, 1338 (1st Cir. 1973), which was specifically endorsed by the House Report on § 307(f), further supports the view that attorneys fees may be awarded to a non-prevailing party:

> We are at liberty to consider not merely "who won" but what benefits were conferred. The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals. When the government is attempting to carry out a program of such vast and unchartered dimensions, there are roles for both the official agency and a private watchdog. The legislation is itself novel and complex. Given the implementation dates, its early interpretation is desirable. It is our impression, overall, that petitioners, in their watchdog role, have performed a service.

The government (Brief, pp. 27-28) seeks to avoid the force of the quoted language by pointing out that the petitioners in the *NRDC* case prevailed on some of their issues. Thus, it is claimed, the court's rationale departs from a "prevailing" requirement only to the extent that it endorses fees for a partially prevailing party.

But that is not what the court said, nor what it held. The court *said* it need not be bound by "who won" or lost the case and it *held* that the petitioners were entitled to fees even on their losing issues:

> "But the challenges here, even those not sustained, were mainly constructive and reasonable. And petitioners were successful in several major respects; they should not be penalized for having also advanced some point of lesser weight." 484 F.2d at 1338.

In any event, the House Report on Section 307(f) endorsed the generalized "grounds" set forth in the *NRDC* opinion, not the holding under the particular facts of that case.

The government seeks to avoid the clearly-expressed legislative intent to abandon the "prevailing party" requirement in Clean Air Act § 307(f) by labeling it "tenuous inferences", based on "ambiguous explanations." (Brief, p. 28). Instead, it contends, Congress added § 307(f) in 1977 solely for the purpose of conforming it to § 304(d), 42 U.S.C. § 7604(d). That section, added in 1970, authorizes awards of attorneys fees in "appropriate" cases brought under Clean Air Act § 304. Section 304(d), it is argued (Brief, pp. 17-22), does not allow fees to non-prevailing parties; therefore, § 307(f) should not be construed to do so, either.

This analysis is flawed in three major respects. First, the 1977 legislative history reveals that Congress intended to do more by adding § 307(f) than merely to conform attorneys fees practice under § 307 with that under § 304. Second, actions under the two sections are fundamentally different in nature and scope, so that the considerations governing the appropriateness of fee awards under each of them are distinct. Finally, both Congress and the courts agree that fees may be awarded to non-prevailing parties under § 304(d), as well as § 307(f).

As the government correctly points out, in the 1970 Clean Air Act Amendments, attorneys fees in "appropriate" cases were specifically authorized for actions brought under § 304, but not under § 307. With the exception of *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331 (1st Cir. 1973), discussed above, the courts refused to allow fees in actions brought under § 307 in the absence of a specific

statutory authorization. The Senate Report on § 307(f) *did* indicate that its purpose was specifically to authorize fees in actions under § 307, as originally intended in 1970, and noted that § 304 already specifically authorizes fees. S. Rep. No. 95-127, 95th Cong., 1st Sess., p. 1473 (1977). But that hardly supports a conclusion that the *only* purpose of the change was to "conform" the two sections. Indeed, as we show below, actions under the two sections are fundamentally different and cannot readily be "conformed".

In any event, the House Report set forth another goal for § 307(f): ". . . to encourage litigation which will assure proper implementation and administration of the Act or otherwise serve the public interest." The House also reacted to two significant judicial developments which had occurred since 1970: the allowance of fees to non-prevailing parties as suggested in *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331, 1338 (1st Cir. 1973) and the requirement set forth in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) that a statute must specifically authorize fees against the government. The final version of § 307(f) approved both the Senate and the House provisions. See Conference Report, H.R.Rep.No. 95-564, 95th Cong., 1st Sess., p. 557 (1977).

A closer examination of the nature and purposes of the Clean Air Act's two citizen suits provisions reveals important differences. Section 304(a) authorizes citizens to bring suit in district courts against persons who violate a standard or order issued under the Clean Air Act or against EPA if it fails to perform a non-discretionary duty under the Act. The legislative history of § 304 makes it abundantly clear that Congress considered that the primary function of citizens suits under § 304 was to aid in

the enforcement of standards and regulations under the Act. The purpose of suits under § 304, therefore, was to assure abatement of illegal air pollution. Accordingly, the Senate Report limited its discussion of when fees would be available to non-prevailing parties to a typical situation which might occur under § 304—abatement of a violation before a verdict was obtained in the litigation. See S.Rep. No. 91-1196, 91st Cong., 2nd Sess., p. 38 (1970).

Section 307 serves a different purpose. It provides an "opportunity for judicial review of administratively developed and promulgated standards and regulations." S. Rep.No. 9-1196, 91st Cong., 2nd Sess., p. 440. Administrative actions reviewable under § 307 are all national or regional in scope. Therefore, petitioners for review under § 307 are to be tried in the Court of Appeals. *Id.* at 441. Actions under § 307 have nothing to do with *enforcement* of air pollution standards; instead, their purpose is to *challenge* those standards. Accordingly, the Senate Committee's reference to abatement before verdict under § 304 would make no sense in the context of a § 307 action.

Therefore, the government's argument simply does not hold water. It concedes that "success on the merits, in the traditional sense of a favorable final judgment, is not a prerequisite for an award of fees under [§ 307]." (Petition for Certiorari, p. 16.) But, it asserts, an award to a non-prevailing party is limited to a situation in which there is pollution abatement in the absence of a final verdict for the plaintiff. While this argument may have some surface plausibility with respect to actions under § 304,[10] it makes

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[10]However, as we show below, non-prevailing parties *are* entitled to fees in appropriate cases under § 304(d).

no sense in the context of § 307(f). Since proceedings under § 307 challenge the standards, themselves, and are not aimed at any specific source of pollution, there is no possibility of abatement of pollution without a final verdict under § 307. Therefore, an award to a non-prevailing party under § 307(f) must refer to something else—*i.e.*, a party who contributes to the goals of the Clean Air Act by helping to insure a proper interpretation of significant issues under the Act.

Finally, even if sections 307(f) and 304(d) should be interpreted the same, the lower court should be upheld, since fees may be awarded to non-prevailing parties under both sections. Section 304(d), like § 307, authorizes fees to "appropriate" parties. As we noted above, the Senate Report on § 304(d) gives one example in which a non-prevailing party may be awarded fees—where abatement of a violation occurs before a final verdict. But this example was not intended to mark the limits of when fees could be awarded under § 304(d). In the section-by-section analysis, the Senate Report notes that: "The court may award costs of litigation to either party whenever the court determines such an award is in the public interest *without regard to the outcome of the litigation.*" [Emphasis added.] S.Rep. No. 91-1196, *supra*, at 65. And Sen. Spong, a prominent supporter of the Clean Air Act, remarked during debate on § 304(d): "The courts are given discretionary authority to award costs, including reasonable attorney and witness fees to *any* party." [Emphasis added.] Senate consideration of the report of the Conference Committee, December 18, 1970, reprinted in "A Legislative History of the Clean Air Act Amendments of 1970," 93rd Cong., 2nd Sess., vol. 1, p. 147 (1974).

The government (Brief, pp. 20-21) attempts to construct, through hindsight, a legislative history to support its view of the switch from a "prevailing party" to an "appropriate" standard in section 304(d). It claims that the sole purpose was to obviate the need for a plaintiff to prevail "in the technical sense of obtaining a judgment" in order to collect fees, citing several opinions which refused to award fees to parties who had not obtained a favorable judgment. But there is no indication that Congress was actually reacting to those cases, or even knew about them. What the Senate Report *does* say, in the clearest possible terms, is that fees may be awarded in the public interest "without regard to the outcome of the litigation." S.Rep. No. 91-1196, *supra*, at 65. The government invites this court to disregard this unambiguous statement because "there is no elaboration" on its meaning and, instead, to rely on its own phantom legislative history to ascertain Congressional intent. While the search for legislative intent always involves some degree of imagination, we are confident that this Court will base its opinion on the language of Congress, rather than the fiction by the Solicitor-General's office.

The courts have consistently construed § 304(d) to allow fees to non-prevailing parties. See, *e.g., Natural Resources Defense Council v. EPA, supra,* 484 F.2d 1331, 1338 (1st Cir. 1973); *Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co.,* 62 F.R.C. 353, 355 (D. Del. 1974); *Citizens Association of Georgetown v. Washington,* 383 F. Supp. 136 (D.D.C. 1974), reversed on other grounds, 535 F.2d 1318 (D.C. Cir. 1976); *Metropolitan Washington Coalition for Clean Air v. District of Columbia,* 639 F.2d 802 (D.C. Cir. 1981). It should be remembered that the

House Report on § 307(f) specifically endorsed the construction of § 304(d) found in the *Natural Resources Defense Council* case.

III

JUDICIAL CONSTRUCTION HAS UNANIMOUSLY APPROVED FEES FOR NON-PREVAILING PARTIES

As we noted in the preceding paragraph, the courts have unanimously construed the "appropriate" standard of § 304(d) to allow fees to non-prevailing parties. The opinion in *Metropolitan Washington Coalition for Clean Air v. District of Columbia,* 639 F.2d 802 (D.C. Cir. 1981) is particularly instructive, since it puts to rest the government's persistent argument that a non-prevailing party must achieve some tangible benefit, other than explication and interpretation of the Clean Air Act. There, citizens sought to enjoin the operation of a municipal incinerator because it was in violation of a state air quality implementation plan calling for it to be shut down. Ultimately, EPA approved a revision of the plan which permitted the incinerator to stay in operation. The district court had refused to grant fees for two main reasons: the incinerator was never shut down and, since EPA was already considering the proposed plan revision, "plaintiffs' efforts in this litigation did not serve to expedite the administrator's decision." 639 F.2d at 804.

The Court of Appeals rejected this logic:

> We think the district court incorrectly focused its attention on the outcome and practical effects of the litigation, to the exclusion of a more relevant consideration: whether the suit was of the type that Congress intended to encourage when it enacted the citizen-suit provision . . . quite obviously the legislature,

> when it called for citizen-suits, considered a fee recovery to be consonant with the public interest whenever the underlying suit was a prudent and desirable effort to achieve an unfulfilled objective of the Act. The attorneys' fee feature was offered as an inducement to citizen-suits, which Congress deemed necessary; and if the hope Congress had for such suits is to become the reality, decisions on fee-allowance cannot make wholesale substitutions of hindsight for the legitimate expectations of citizen plaintiffs. 639 F.2d at 804.

The court noted that, although the plaintiffs' litigation did not in fact yield "actual and tangible effects", they had a "well-founded expectation" at the time the suit was brought that it would succeed. Thus, the lower court should not have refused automatically to grant fees.

Several other opinions from the D.C. Circuit Court of Appeals have endorsed the rationale of the lower court case. See, *e.g., Alabama Power Co. v. Gorsuch,* 672 F.2d 1 (1982); *Environmental Defense Fund v. EPA,* 672 F.2d 42 (1982); *Village of Kaktovik v. Watt,* ..... F.2d ..... (D.D.C. No. 81-1752, October 1, 1982). The Ninth Circuit, too, agrees with the lower court's analysis. See *Northern Plains Resources Council v. EPA,* ..... F.2d .....

Understandably, the government neglected to mention any of these cases in its brief, since they all directly contradict its position. On the other hand, it cannot cite a single authority to support its view that a non-prevailing party may never be awarded fees under § 307(f).

IV

THE GOVERNMENT'S PUBLIC POLICY ARGUMENTS ARE INACCURATE; IN ANY EVENT, THEY SHOULD BE ADDRESSED TO CONGRESS, NOT THIS COURT

The government argues (Brief, pp. 30-37) that judicial interpretation of key provisions of the Clean Air Act does not further the goals established by Congress, and hence cannot be the basis of a fee award. But, as we noted above, *Natural Resources Defense Council v. EPA*, 484 F.2d 1331, 1338, which was endorsed in the House Report, specifically stated that the "early interpretation" of the Clean Air Act by outside "watchdogs" is "desirable". The court below specifically found that the Sierra Club's participation facilitated "the prompt resolution of the important and complex issues" involved in the interpretation of a key provision of the Clean Air Act and that its participation "aided agency implementation and Congressional reevaluation of the Act". 672 F.2d at 41.

As the court below noted, the government is simply trying to read the "appropriate" standard right out of § 307 (f): "Under the government's position, there would have been no need to abandon the 'substantially prevailing' standard commonly used to guide judicial awards of attorneys' fees." 672 F.2d at 38. It is obvious that the government's real purpose here is to persuade this court to abandon the law as Congress wrote it in favor of its conception of the "public good". As we showed above, this Court may not do that.

But we emphatically dispute the government's insinuations (see, *e.g.*, Petition for Certiorari, p. 8; Brief, p. 37) that the lower court's decision will set a precedent which

will encourage ill-founded, "unproductive" litigation. In fact, awards of fees to non-prevailing parties under statutes using the "appropriate" language are likely to be quite rare. See, *e.g., Village of Kaktovik v. Watt,* ..... F. 2d ..... (D.C. Cir. No. 81-1752, October 1, 1982). In that case, the Court of Appeals refused to award fees to non-prevailing plaintiffs under provisions of the Outer Continental Shelf Lands Act (43 U.S.C. § 1349(a)(5)) and the Endangered Species Act (16 U.S.C. § 1540(g)(4)) which are virtually identical to Clean Air Act § 307(f). The court found that the plaintiffs, unlike the petitioners in this case, had not raised critical issues of national importance, nor were the legal issues novel or complex.

The Court of Appeals' opinion in the present case also emphasized that awards of fees to non-prevailing parties would be rare, limited to "exceptional" cases. 672 F.2d at 39. Therefore, the government's fears of a rash of fee awards to parties who did not prevail in trivial lawsuits is completely unfounded.

There is another, practical reason why the lower court's opinion will not open the floodgates to ill-conceived litigation. This Court has made it plain that, as a general rule, a party must participate in agency rule-making and advance all of its arguments at the administrative level as a prerequisite to judicial review. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 553-54 (1978). This is especially true under § 307 of the Clean Air Act. See *American Petroleum Institute v. Costle,* 615 F.2d 1176, 1190-91 (D.C. Cir. 1981), cert. *den.* 102 S. Ct. 1737 (1982). Such administrative ac-

tion, which is likely to be immensely time-consuming,[11] is *not* compensable under § 307(f). See *Sierra Club v. Gorsuch*, 672 F.2d 33. Thus, potential litigants with doubtful claims are unlikely to be tempted into embarking upon the long and expensive process of challenging major administrative action on the slim hope that they might recover attorney's fees for the judicial portion of the litigation even if they lose.

CONCLUSION

The government does not challenge the Court of Appeals' conclusion that the issues in this case were extraordinarily complex and important and the calibre of the submissions by the petitioners was exemplary. Nevertheless, it argues that the court below erred, since fees may never be awarded to a non-prevailing party under §307(f). This absolutist view of the law flies in the face of the specific language of the statute, the unambiguous legislative history, and a long string of judicial opinions. The Solicitor-General asks this court to usurp the functions of Congress by re-writing the statute to conform to his views of public policy. This court should firmly reject this invitation to act as a super-legislature.

Oakland, California; January 7, 1983.

Respectfully submitted,

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[11]For example, in the present case, the Sierra Club originally sought fees for a total of 1,104.5 hours, representing its efforts in the underlying judicial and administrative proceedings. See Motion for an Award of Attorneys Fees, filed May 12, 1981. However, the final award by the court was for only 406.5 hours, of which 42.5 hours were spent on the attorneys fees issue. See Sierra Club v. Gorsuch, 684 F.2d 972, 973-74 (D.C. Cir. 1982). The Sierra Club attorneys were thus forced to expend a total of 740.5 hours on this litigation for which no compensation was available.